Filed 12/1/16 In re S.T. CA2/2

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

In re S.T., a Person Coming Under the Juvenile Court Law.	B270631 (Los Angeles County Super. Ct. No. DK13882)
LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. M.T., Objector and Appellant.	

APPEAL from an order of the Superior Court of Los Angeles County. Julie Fox Blackshaw, Judge. Affirmed.

Christine E. Johnson, under appointment by the Court of Appeal, for Objector and Appellant.

Mary C. Wickham, County Counsel, R. Keith Davis, Acting Assistant County Counsel, and Tyson B. Nelson, Deputy County Counsel, for Plaintiff and Respondent.

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Objector and appellant M.T. (father) challenges a juvenile court order removing his then four-month-old daughter from his custody and placing the child with her mother. Father argues that the court's order is statutorily prohibited and not supported by substantial evidence. We disagree, and affirm.

FACTS AND PROCEDURAL HISTORY

Father and S. S. (mother) have one child together, S.T. In March 2015, while mother was four months pregnant with S.T., father took a phone from mother's hands and threw it across the room, pulled her hair hard enough to yank out one of her braids, and scratched her forehead. In October 2015, just a month after S.T.'s birth, father pushed mother into a mirror so hard that the mirror shattered and cut mother near her left eye. S.T. was in the room at the time of the incident. On three other occasions in 2015, the police responded to domestic violence calls at mother's and father's apartment.

Following the October incident, the Los Angeles County Department of Children and Family Services (Department) filed a petition asking the juvenile court to exert dependency jurisdiction over S.T. Specifically, the Department alleged that the parents' "history of engaging in violent altercations" created a "substantial risk that the child will suffer[] serious physical harm" either "inflicted nonaccidentally upon the child by [her] parent" or "as a result of the failure or inability of . . . her parent . . . to adequately . . . protect the child." (Welf. & Inst. Code, § 300, subds. (a) & (b)(1).)[1]

The juvenile court sustained the petition, noting the "frequency of violence between the parents" and the fact that S.T. was present at the March and October 2015 incidents (albeit in utero during the first incident).

The court also ordered S.T. removed from father and placed with mother under the Department's supervision. The court ordered that father have three hours of monitored visits per week, with mother not to be present.

Father timely appeals.

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1 All further statutory references are to the Welfare and Institutions Code unless otherwise indicated.

DISCUSSION

Father argues that the juvenile court's removal order is invalid because (1) a juvenile court lacks the power to remove a child from one parent and to place the child with the other where both parents were previously living together, and (2) even if the court had that power, there is insufficient evidence to warrant removal in this case.[2] Father's first objection raises a question of law, which we review de novo. (*In re Marquis H.* (2013) 212 Cal.App.4th 718, 725.) Father's second objection requires us to evaluate whether the record, when viewed in the light most favorable to the juvenile court's removal finding, contains sufficient evidence to support that finding. (*In re A.F.* (2016) 3 Cal.App.5th 283, 292; *In re K.S.* (2016) 244 Cal.App.4th 327, 341.)

I. Removal Authority

Once a juvenile court finds sufficient evidence to exercise its dependency jurisdiction over a child, "the court may limit the control to be exercised over the . . . child by any parent or guardian." (§ 361, subd. (a)(1).) This authority includes the power to remove the child from the physical custody of the "parents" "with whom the child resides at the time the petition was initiated" if the court finds by clear and convincing evidence that "[t]here is or would be a substantial danger . . . to the minor if the minor were returned home, and there are no reasonable means by which the minor's physical health can be protected without removing the minor from the minor's parent's . . . physical custody." (*Id.*, subd. (c)(1).) In assessing whether there are reasonable means to protect a child, the court must also "*consider*" (1) "[t]he option of removing an offending parent or guardian from the home," and (2) "[a]llowing a nonoffending parent . . . to retain physical custody as long as that parent . . . presents a plan acceptable to the court

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2 For the first time in his reply brief, father states that there is also insufficient evidence to support the juvenile court's assertion of dependency jurisdiction over S.T. Because this issue was not raised in father's opening brief, it is waived. (*In re Luke H.* (2013) 221 Cal.App.4th 1082, 1090.) It also lacks merit for the same reasons we reject his challenge to the sufficiency of the evidence underlying the court's removal order.

demonstrating that he or she will be able to protect the child from future harm." (*Id.*, subd. (c)(1)(A), (B).)

Father argues that a juvenile court lacks the statutory authority to remove a child from one parent while leaving the child in the custody of the other. *In re Michael S.* (2016) 3 Cal.App.5th 977 recently rejected this precise argument, and did so for good reason. The text of section 361, subdivision (c)(1) states that a court may order removal whenever there is "clear and convincing evidence" of "substantial danger" to a child's "physical health, safety, protection, or physical or emotional well-being." The text does expressly carve out an exception to this authority when the court finds that removal is only warranted against one of the two parents with whom the child was living. Every case to consider the issue so far has read the statute to permit such a removal. (*In re Michael S.*, at pp. 984-986; see, e.g., *In re D.G.* (2012) 208 Cal.App.4th 1562, 1574 [ordering removal from one parent and placing child with the other]; *In re E.B.* (2010) 184 Cal.App.4th 568, 574, 578 (*In re E.B.*) [same].)

Father raises three arguments in response. First, he notes that section 361, subdivision (c) at one point refers to removal from the "*parents* . . . with whom the child resides," and asserts that the use of the plural means that removal must be from both parents or neither parent. But the same provision goes on to discuss "removing the minor from the minor's *parent's* . . . physical custody," in the singular. We decline to infer a broad exception to the statute's plain meaning from the statute's "inconsistent" use of the plural and singular, particularly where the Legislature specifically instructs that such an "inconsistency" is not an inconsistency at all. (§ 13 ["[t]he singular number includes the plural, and the plural number includes the singular"].) Relatedly, father asserts that section 361 instructs the juvenile court to "consider" alternates to removal, such as excluding the offending parent from the home or allowing the nonoffending parent to maintain custody of the child. (§ 361, subd. (c)(1)(A), (B).) But these are "option[s]" for the court to "consider"—not dictates that the court must follow.

Second, father asserts that *In re N. S.* (2002) 97 Cal.App.4th 167 supports his position that a court may not order removal and then place a child back with a parent. Father misreads *In re N. S.* That case precludes a

court from removing a child from a parent and then placing her *back with the same parent*. (*Id.* at pp. 172-173 & fn. 5; *In re Andres G.* (1998) 64 Cal.App.4th 476, 483.) In that situation, the court's two orders are fundamentally inconsistent and thus in excess of the court's jurisdiction. This inconsistency does not exist where the court removes a child from one parent and places her with the other.

Lastly, father cites California Rules of Court, rule 5.695. Rule 5.695(a) sets forth the various dispositional options available to a juvenile court, including "[d]eclar[ing] dependency[and] permit[ing] the child to remain at home . . ." (Cal. Rules of Court, rule 5.695(a)(5)) and "[d]eclar[ing] dependency[and] remov[ing] physical custody from the parent or guardian" (Cal. Rules of Court, rule 5.695(a)(7)). Father seems to suggest that because these two options are listed in separate subdivisions, a court cannot do both at the same time—that is, cannot remove a child from one parent and leave her with the other. Even if we ignore that the language of section 361 trumps rule 5.695 (*In re Abbigail A.* (2016) 1 Cal.5th 83, 92), nothing in rule 5.695 prevents a court from pursuing more than one option at a time as long as doing so is otherwise within the court's statutory authority. Here, it is.

In sum, the juvenile court had the statutory authority to issue an order removing S.T. from father and placing her with mother.

II. Sufficiency of the Evidence

In reviewing a removal order for substantial evidence on appeal, the California courts are divided on whether we must factor in the clear and convincing evidence standard. (Compare *In re J.S.* (2014) 228 Cal.App.4th 1483, 1492-1493 [noting that the "'clear and convincing test disappears'" on appeal] with *In re Noe F.* (2013) 213 Cal.App.4th 358, 367 [noting that appellate court must "keep[] in mind" the higher burden of proof].) We need not take a position on that issue in this case because, even if we "keep[] in mind" the clear and convincing standard of proof for removal, substantial evidence supports the juvenile court's order removing S.T. from father. The evidence reveals two incidents in which father struck or otherwise injured mother while S.T. was present. "'Both common sense and expert opinion indicate spousal abuse is detrimental to children,' [citation]" in part because

they can be—and in this case, have been—put in harm's way. (*In re E.B.*, *supra*, 184 Cal.App.4th at pp. 575-576.)

Father makes three further arguments. First, he argues that there is no continuing risk to S.T. because he is no longer living in the home with S.T. and mother. But this ignores that the reason he is no longer living at home—and thus is no risk—is *because of* the removal order. More to the point, it is the incendiary nature of mother's and father's relationship that creates the danger to S.T., and it can ignite into violence whenever they are together. Removing S.T. from father reduces the risk of further conflagrations.

Second, father seems to assert that there is another "reasonable means" to protect S.T. aside from removal—that is, ordering him out of the house without a removal order. However, because mother later minimized and downplayed father's violence toward her, the juvenile court had ample reason to suspect that any order short of removal would not be sufficient to protect against the collusive conduct of both parents.

Lastly, father contends that he has since "accepted responsibility" for his conduct. The record is to the contrary, and reflects him minimizing his own misconduct during the March and October incidents.

DISPOSITION

The judgment is affirmed.

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_____, J.
HOFFSTADT

We concur:

_____, P. J.
BOREN

_____, J.
CHAVEZ